Supreme Court, U.S.
FILED
NOV 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-594

In The
Supreme Court of the United States
October Term, 1987

SHELDON LOVELACE,

Petitioner,

v.

ACME MARKETS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HERBERT G. KEENE, JR.
STEPHEN C. BAKER
STRADLEY, RONON, STEVENS & YOUNG
1100 One Franklin Plaza
Philadelphia, PA 19102
(215) 564-8000

Attorneys for Respondent

Of Counsel:

ANDREA R. KRAMER
Acme Markets, Inc.
124 North 15th Street
Philadelphia, PA 19101
(215) 568-3000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

Whether "good cause" for a plaintiff's failure to serve process upon a defendant with conspicious local offices within the 120-day period required by Federal Rule of Civil Procedure 4(j) is demonstrated where plaintiff unnecessarily engages a "process server" to effect service, receives no timely affidavit or proof of service, and makes no attempt to effect service by several available alternate methods.[1]

---

[1] Acme Markets, Inc. is a wholly-owned subsidiary of American Superstores, Inc. Acme Markets, Inc. has no subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES:

Geiger v. McClurg Court Assocs., No. 86 C-4419 (N.D. Ill., slip op. June 9, 1987) 5

Lovelace v. Acme Markets, Inc., 820 F.2d 81 (3d Cir. 1987) 3, 6

Redfield v. Continental Cas. Co., 818 F.2d 596 (7th Cir. 1986) 5

Texas v. Mead, 465 U.S. 1041 (1984) 5

Wei v. Hawaii, 763 F.2d 370 (9th Cir. 1985) 5

STATUTE:

42 U.S.C. § 2000e (1982) 1

FEDERAL RULES OF CIVIL PROCEDURE:

Fed.R.Civ.P. 4, 28 U.S.C. ..... *passim*

Fed.R.Civ.P. 55(c), 28 U.S.C. 5

STATEMENT OF THE CASE

On October 29, 1985, Sheldon Lovelace ("Lovelace") filed a complaint against Acme Markets, Inc. ("Acme") in the United States District Court for the Eastern District of Pennsylvania.[2] Lovelace averred that Acme had discriminated against him in employment on account of race, and requested relief under Title VII[3] and various state law theories.

Lovelace's complaint reflected that he was a resident of Philadelphia and that Acme was a Pennsylvania corporation with its principal place of business in downtown Philadelphia.[4] The office of Lovelace's counsel was also in downtown Philadelphia.

On the day the complaint was filed, the Clerk of the District Court granted Lovelace's motion to appoint Michael Damiano ("Damiano") to serve the summons and complaint upon Acme.[5] Damiano was a "process server" whose office was located in the Philadelphia suburbs.[6]

On December 2, 1985, Damiano submitted a bill to plaintiff's counsel, indicating that service of the complaint had been made upon Acme.[7] On February 26, 1986, the 120th day after filing of the complaint, Lovelace's counsel

---

2 J.A. 3. "J.A." refers to the Joint Appendix filed in the Court of Appeals.

3 42 U.S.C. § 2000e (1982).

4 J.A. 11.

5 J.A. 3.

6 J.A. 40.

7 J.A. 46.

sent a letter to Damiano requesting adequate proof that service of the complaint had been made.[8]

On April 1, 1986, Lovelace's counsel received a letter from the Clerk of the District Court.[9] This letter directed that service be made within fifteen days, and warned that if service was not made within that time "the Court will consider dismissal of the action or those portions of the action that the Court concludes should be dismissed under the circumstances."[10]

Service of the summons and complaint were actually made upon Acme on April 23, 1986.[11] Service thus occurred 175 days after the complaint had been filed and seven days after expiration of the deadline stated in the Clerk's April 1 letter.

Acme moved to dismiss Lovelace's complaint for failure to serve process within the 120-day period provided by Federal Rules of Civil Procedure 4(j).[12] Lovelace opposed the motion and contended that there was good cause for his failure to make service within the required 120-day period.[13]

On September 22, 1986, the District Court entered an Order granting Acme's motion and dismissing Lovelace's

---

8 J.A. 48-49.

9 J.A. 52.

10 J.A. 52.

11 J.A. 54.

12 Fed.R.Civ.P. 4(j), 28 U.S.C. (1983).

13 J.A. 23.

complaint without prejudice.[14] The District Court concluded that the circumstances of the case did not demonstrate good cause for the tardy service.[15] On October 29, 1986, the District Court entered an order denying Lovelace's motion for reconsideration.[16]

Lovelace appealed the decision of the District Court. On May 29, 1987, the Court of Appeals affirmed the decision of the District Court.[17] The Court of Appeals concluded that Lovelace's reliance upon the representation of a specially-appointed process server that timely service had been made failed to establish good cause for untimely service, given that appointment of the process server had been unnecessary, that Lovelace and his counsel never received timely proof that service had actually occurred, and that they never utilized any of the alternate means that existed to insure timely service.[18]

The Court of Appeals denied Lovelace's motion for rehearing on July 13, 1987. Lovelace thereupon filed a petition for a writ of certiorari.

———o———

REASONS FOR DENYING THE WRIT

This case raises the very narrow question of whether its decidedly peculiar facts constitute good cause for un-

---

14 J.A. 3.

15 J.A. 71-75.

16 J.A. 3.

17 *Lovelace v. Acme Markets, Inc.*, 820 F.2d 81 (3d Cir. 1987).

18 *Id.* at 83-84.

timely service of process. This question of interpretation of and inference from facts has been considered and decided twice—once by the District Court and again by the Court of Appeals. In each instance, the court below decided that good cause had not been shown. Notwithstanding the importance of the case to the parties, it does not raise any issue beyond the question of fact interpretation that has already been twice decided. This case does not present a procedural issue that can be expected to recur frequently, does not present or suggest any "conflict" among the Courts of Appeals, and does not present any question as to the propriety of the application of Rule 4 by the lower federal courts.

Under Rule 4(a), the responsibility for prompt service of process rests with the plaintiff or his counsel.[19] A plaintiff's options in fulfilling this responsibility are many. The rule expressly allows process to be served by anyone who is over eighteen years of age and not a party.[20] When the defendant to be served is a corporation, Rule 4 offers a variety of methods by which service can be made, ranging from mail directed to the defendant,[21] to personal service upon the corporation's office,[22] to service in person or by mail upon an agent designated for service of process.[23] If, despite all of these options, a plaintiff fails to effect service within 120 days after the filing of the com-

---

19 Fed.R.Civ.P. 4(a), 28 U.S.C. (1983).

20 Fed.R.Civ.P. 4(c)(2)(A), 28 U.S.C. (1983).

21 Fed.R.Civ.P. 4(c)(2)(C)(ii), 28 U.S.C. (1983).

22 Fed.R.Civ.P. 4(d)(3), 28 U.S.C. (1983).

23 Fed.R.Civ.P. 4(d)(3), 28 U.S.C. (1983).

plaint and is unable to show good cause why service was not made within that period, the action must be dismissed.[24]

Here, Lovelace argues, as he did unsuccessfully to the District Court and the Court of Appeals, that the misstatement of his specially-appointed process server shows good cause for the failure to effect timely service by any other means. That badly misses the point in two ways.

First, it does not suggest any question calling for this Court's discretionary review. The issue of good cause turned and was decided upon the case's particular —and peculiar—facts. The Court has made clear that it does not grant certiorari to review facts.[25] Furthermore, there is no conflict between the Courts of Appeals as to whether facts such as these, or even a given quantum or variety of facts, establishes good cause. Any differences in the decisions of the Courts of Appeals reflect, instead, differences in assessment of facts of individual cases.[26] The grant of this petition would invite a flood of similar fact-based petitions. Were the Court to grant certiorari here to determine whether these facts show good cause for untimely service, other litigants would be encouraged to file petitions seeking review of a wide spectrum of fact-sensitive decisions.[27]

---

24 Fed.R.Civ.P. 4(j) (1983).

25 *Texas v. Mead*, 465 U.S. 1041 (1984).

26 *Compare, e.g., Wei v. Hawaii*, 763 F.2d 370 (9th Cir. 1985), with the decision of the Court of Appeals here. *See also Geiger v. McClurg Court Assocs.*, No. 86-C-4419 (N.D. Ill., slip op. June 9, 1987).

27 Such decisions include, to cite but two examples, such things as whether a party has demonstrated "excusable neglect" in filing an untimely appeal, *Redfield v. Continental Cas. Co.*, 818 F.2d 596 (7th Cir. 1986), and whether a party has shown "good cause" for setting aside an entry of default. Fed.R.Civ.P. 55(c), 28 U.S.C. (1982).

Second, this case does not, as Lovelace believes, raise any question of unfairness in the application of Rule 4. Lovelace's argument that the misstatement of the specially-appointed process server explains the failure to make untimely service has a fatal logical flaw. There was no need at all for appointment of the process server in the first place.[28] Since Rule 4 did not require the appointment of the process server, no issue arises as to unfairness of enforcement of the 120-day time limit for service by that method. As the Court of Appeals recognized, this argument overlooks Lovelace's failure even to attempt service on this local defendant by any one of the several alternate methods available.[29] There is, therefore, no issue as to the fairness or the construction of Rule 4.

Instead, the question here, fully reviewed by the District Court and Court of Appeals, is whether these facts show good cause for untimely service. That is not a question appropriate for this Court's review.

———o———

---

[28] In fact, this is not a case in which a special appointment to serve process was even appropriate. Rule 4(c)(2)(B) provides that a special appointment shall be made *"only"* on behalf of a party proceeding *in forma pauperis*, on behalf of a seaman, on behalf of the United States, or pursuant to an order providing that a special appointment is necessary for service to be promptly effected. Fed.R.Civ.P. 4(c)(2)(B), 28 U.S.C. (1983) (emphasis added).

[29] *Lovelace*, 820 F.2d at 85.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

HERBERT G. KEENE, JR.
STEPHEN C. BAKER
STRADLEY, RONON, STEVENS
& YOUNG
1100 One Franklin Plaza
Philadelphia, PA 19102
(215) 564-8000

Attorneys for Respondent

Of Counsel:

ANDREA R. KRAMER
Acme Markets, Inc.
124 North 15th Street
Philadelphia, PA 19101
(215) 568-3000